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No. 82-1832

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

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TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION, and TOWN OF WASHINGTON,
*Petitioners,*

v.

CITY OF EAU CLAIRE,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF OF THE AMERICAN AMBULANCE ASSOCIATION AND THE CALIFORNIA AMBULANCE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Should the Court Require a Showing of Specific State Legislative Authority To Permit Local Government Immunity for Activities Violative of the Antitrust Laws?

2. Should the Court Adopt the Ninth Circuit's Standard of State Action Immunity for Challenged Local Governmental Activity if It Will Not Require Specific State Legislative Authorization for the Challenged Activity?

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### INTEREST OF AMICUS CURIAE

The American Ambulance Association has a current membership of approximately six hundred ambulance service companies operating in forty-nine states. The California Ambulance Association is a membership organization of approximately ninety ambulance service companies operating in California.

Ambulance providers, in general, include individual businesses and corporations operated for profit, volunteer not-for-profit associations, and local government-owned

services, which often operate out of the local fire department. The significance of the ambulance industry is indicated by its total gross revenues, $1.5 billion (1979),[1] and number of transports, 20 million emergency and non-emergency.[2] In California alone, 2000 ambulance vehicles made over one million emergency medical runs during 1982.

Any ruling by this Court construing the scope of the state action antitrust immunity first set forth in *Parker v. Brown*, 317 U.S. 341 (1943), will have a direct and substantial effect on the member companies of the American Ambulance Association and the California Ambulance Association ["the Associations"]. The decision of the Seventh Circuit in *Town of Hallie, et al. v. City of Eau Claire*, 700 F.2d 376 (1983) reads the state action exemption of the Sherman Act broadly, in a manner likely to stimulate the growth of local government as a "protected entrepreneur."

A broad decision by this Court affirming *Town of Hallie* may undermine or destroy many of the thousands of existing private ambulance companies throughout the United States, including many members of the Associations, and diminish the availability and quality of ambulance service beyond the political boundary of local government monopolies.

## STATEMENT OF THE CASE

Amicus accepts the Statement of the Case as set forth by Petitioners.

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[1] U.S. Department of Transportation, Emergency Medical Services Division, National Safety Council Annual Report 1979.

[2] U.S. Department of Health and Human Services, Health Care Finance Administration Statistical Information Service, 1984.



## SUMMARY OF ARGUMENT

The Court should adhere to a strict standard of state authorization and supervision of anticompetitive local government activities for state action immunity to apply. A permissive standard based on the atypical factual situation of *Town of Hallie* will encourage the more typical problem, the exclusion of private enterprise through local government as a "protected entrepreneur." A more faithful exposition of this Court's formulation in *Lafayette* is by the Ninth Circuit, not the one applied by the Seventh Circuit here.

A pending Congressional legislative enactment limiting local government liability for damages in antitrust claims argues for a showing of specific state legislative authorization to engage in the anticompetitive conduct.

## ARGUMENT

### I. THE COURT SHOULD DECIDE *TOWN OF HALLIE* NARROWLY AND NOT ESTABLISH BROAD DOCTRINE REGARDING STATE ACTION IMMUNITY ON AN ATYPICAL FACTUAL SITUATION.

The Seventh Circuit decision in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) applied a state action immunity standard which will sow confusion in other cases which more directly raise questions as to the permitted scope of local government as protected entrepreneur. The Ninth Circuit standard is more consistent with the Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) and *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982). An even stricter standard is needed to guide courts in reviewing the activities of local government as protected entrepreneur because of the uncertainty created by the Circuits' inconsistent applications of state action immunity doctrine.

*Town of Hallie* is an atypical case among those raising state action immunity issues, involving a relationship among municipalities regarding the provision of services beyond political boundaries. *Town of Hallie* does not involve a local government excluding private business from the marketplace or restraining it from competing. A typical state action immunity case is where local government engages in a business activity and by ordinance prohibits or restrains competition from any private enterprise.

This situation is better described in *Gold Cross Ambulance Co. v. Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (Aug. 9, 1983), where the city purchased the assets and licenses of four private ambulance companies to operate a city-owned, profit-making ambulance service through a private management company. The city monopoly provides emergency and non-emergency service. To assure the financial success of its new venture, the city by ordinance prohibits any competition with its ambulance company within its political boundaries. The city points to a state statute permitting it to provide *emergency* ambulance services as authority not only to provide exclusive *emergency* service but also exclusive *non-emergency* service throughout the city. The statute must fairly be regarded as neutral in its competitive effect and not indicative of any state program to displace competition with regulation.

Contrast the atypical *Town of Hallie* with the typical *Springs Ambulance Service, Inc. v. Rancho Mirage*, No. 84-5509 (9th Cir., *argued* May 15, 1984), wherein a combination of cities passed ordinances to cripple a healthy private ambulance enterprise which had provided high-quality service for years even before the cities themselves were incorporated. The ordinances are designed to seize for the local government ambulance company a captive



market. The cities point to a patchwork of statutory authority devoid of state intent to displace competition with regulation in an attempt to cloak their anticompetitive conduct with state action immunity.

The cases percolating through the lower courts raising typical state action immunity questions involve local government efforts to seize profitable commercial activity for themselves. The inspiration is revenue enhancement rather than state planning to displace competition with regulation.

## II. THE COURT SHOULD CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS STRICT REQUIREMENTS OF STATE AUTHORIZATION AND SUPERVISION FOR STATE ACTION IMMUNITY TO APPLY TO CHALLENGED CONDUCT.

### A. The Court Should Require a Showing of Specific Legislative Authority to Engage in the Challenged Conduct.

This Court stated that a political subdivision need not necessarily "point to a specific, detailed, legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." *Lafayette*, *supra*, 435 U.S. at 415. As a result of this expression, the circuits have developed a bewildering variety of opinions as to the degree of specificity required in a state grant of authority needed for state action immunity to apply. The conflict among the circuits suggests that the degree of specificity required should be strengthened by adopting a standard that requires a local government to point to a specific legislative authorization before it may assert a *Parker* defense to an antitrust suit.

Indicative of the post-*Lafayette* uncertainty, several circuits have permitted local government anticompetitive behavior based on the stitching together of disparate state statutes, or by reading implications into regulatory

statutes devoid of state intent to displace competition with regulation. Several circuits have permitted local government anticompetitive conduct merely because the state regulates the activity in which the challenged conduct arises. The Seventh Circuit requires only that the anticompetitive conduct by the city "be a reasonable or foreseeable consequence of engaging in the authorized activity." *Town of Hallie v. City of Eau Claire*, *supra*, 700 F.2d at 381. In the judgment of the Eighth Circuit, a sufficient policy to displace competition exists "if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross Ambulance Co. v. Kansas City*, *supra*, 705 F.2d at 1013. The Tenth Circuit standard is the most permissive, finding immunity for various anticompetitive activities where a state statute had simply made the operation of a municipal airport a governmental function. *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982).

The standards applied in these decisions are not in keeping with the *Lafayette* requirement that it must be "found from the authority given a governmental entity to operate in a *particular* area, that the legislature contemplated the *kind of action* complained of." 435 U.S. at 415 (*emphasis added*). The mere existence of state regulation of an activity does not give rise to an automatic antitrust exemption. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976). Yet the tendency in the Seventh, Eighth and Tenth Circuits has been toward immunity by implication rather than immunity by clearly articulated and affirmatively expressed state policy, even though "implied antitrust immunity is not favored." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720 (1975).



The imprecision in state action doctrine that must be squelched if the differences in its application by the circuits are to be reconciled is the notion that courts can "infer" unexpressed state policy intentions. *See Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 717 (3d Cir. 1978); *Kurek v. Pleasure Driveway & Park District of Peoria, Ill.*, 557 F.2d 580, 590 (7th Cir. 1977); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975). This notion gained momentum with the *Lafayette* plurality's approving quotation of the Fifth Circuit's dictum that a state need only "contemplate" an anticompetitive activity to bestow immunity from the antitrust laws upon a local government implementing the activity. 435 U.S. at 415. This statement undercut the significance of the plurality's conclusion that the anticompetitive restraint be "part of a comprehensive regulatory system . . . clearly articulated and affirmatively expressed as state policy." *Lafayette*, *supra*, 435 U.S. at 410; *cf.* Areeda, "Antitrust Immunity For 'State Action' after *Lafayette*," 95 *Harv.L.Rev.* 435, 445 (1981).

Under this notion, all a court need ascertain to infer state intent to displace competition with the kind of conduct complained of is whether the conduct is a "reasonable or foreseeable" (Seventh Circuit) or "necessary or reasonable" (Eighth Circuit) consequence of the court-inferred state policy. The reviewing court operates in a darkness without "the pole-star by which all must be guided in ordering their business affairs" (*Lafayette*, *supra*, 435 U.S. at 406) with only the *local government* interests and disparate statutes and regulations generally relevant to the subject matter activity available to determine "reasonability." But the "reasonability," "necessity," and "foreseeability" of anticompetitive conduct cannot be inferred from state statutes silent as to any express intent to displace competition because "[r]easonableness is not a concept of definite and unchanging content." *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927). The anticompetitive conduct inferred to be

reasonable today may through economic and business changes become unreasonable tomorrow. Once established, the anticompetitive conduct may be institutionalized into a "traditional governmental function" *because* of the absence of competition. *Id.* "*[I]n the absence of express legislation requiring it*, [the Court] should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether [local government anticompetitive activities] are reasonable." *Id.*, 273 U.S. at 398 (*emphasis added*). Without express state policy to exclude competition, the local government foists an implied exclusion from the antitrust laws upon the state to the local government's own advantage, even though "[t]he presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions." *Lafayette, supra*, 435 U.S. at 399.

"[T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal action challenged as anticompetitive." *Boulder, supra*, 455 U.S. at 55. "Nor can those actions be truly described as 'comprehended within the powers *granted*' [when a court must infer state intent], since the term, 'granted,' necessarily implies an affirmative addressing of the subject [i.e., exclusion from the antitrust laws] by the State." *Id.* "A state policy preferring monopoly to competition cannot be demonstrated by inference." *Grason Electric Co. v. Sacramento Municipal Utility District*, 526 F. Supp. 276, 280 (E.D.Ca. 1981).

The pending Congressional effort to restrict treble damage claims against local governments (*see infra*, Part III) supports the proposition that more, rather than less, specificity is needed in the grant of state authority. This Court's concern about treble damage exposure for



local governments has been a motive force behind the willingness of some of the Justices to permit anticompetitive behavior by a local government even where the state legislature's grant of authority is not precise. *See Cantor, supra*, 428 U.S. at 615 (Stewart, J., dissenting); *see Lafayette, supra*, 435 U.S. at 442 (Blackmun, J., dissenting). That concern should be lessened by the enactment of the pending legislation addressing the issue. This limitation of local government liability may encourage aggressiveness on the part of local governments interested in controlling commercial activities for parochial revenue enhancement purposes. A strict Court rule on the degree of specificity needed in state authorization for immunity to apply to challenged activity will temper this aggressiveness.

Strict specificity is an achievable *sine qua non* of state legislatures for state action immunity to apply to local governmental anticompetitive conduct. State legislatures are demonstrably sensitive to providing clear-cut authority to their municipal and county subdivisions to engage in anticompetitive conduct when needed.[3] The proper

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[3] *E.g.*, California Assembly Bill No. 3153 (February 15, 1984) provides:

> SECTION 1. (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.
>
> (b) It is the intent of the Legislature in enacting this act at the 1983-84 Regular Session of the Legislature, to prescribe and exercise the degree of state direction and supervision over emergency medical services as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed

route for a city seeking anticompetitive advantages is to its state legislature through its state representatives.

### B. The Court Should Adopt the Ninth Circuit's Standard if it Will Not Require Specific Legislative Authorization for the Challenged Conduct.

The Ninth Circuit adheres to *Lafayette* by requiring a conscious state legislative displacement of the antitrust laws for the immunization of local government anticompetitive conduct. The Ninth Circuit requires that a city demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the alleged anticompetitive actions. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). A court reviewing a local government acting as entrepreneur must focus upon the state alternative regulatory scheme which displaces competition and determine whether the challenged conduct is in furtherance of that scheme. This Court has rejected the thesis that the broadest form of state delegation, i.e., "home rule," is sufficient to permit conduct violative of the federal antitrust laws. *See Boulder*, *supra*; *cf.* Areeda, *supra*, 95 *Harv.L.Rev.* at 449.

Local governments will rely on broad expressions of generalized state authority to make self-serving decisions

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functions under Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

1797.85. "Exclusive operating area" means a subarea of an EMS area defined by the emergency medical services plan for which a county grants an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support.



as to the need to control areas of commercial enterprise unless restrained by a requirement of strict authorization by the state. City-statism is fueled by local governmental desire to raise non-tax revenues or to advance political interests by expanding patronage opportunities.[4]

The Tenth Circuit's post-*Lafayette* standard, for example, could permit a beach resort city to take over local fast food operations on little more than the city's own self-serving finding that local fast food operations persistently fail to meet state health and safety requirements for food handling coupled with a legislative statement that regulation of restaurant activities is a traditional governmental activity. *See Pueblo Aircraft Service*, *supra*. Similarly, the standard of the Seventh and Eighth Circuits—that an anticompetitive activity must be merely a "reasonable and foreseeable" or "necessary or reasonable" consequence of an inferred state policy to displace competition—is open to arbitrary applications by courts reviewing challenged local government conduct. This standard looks at the reasonableness or foreseeability of the challenged conduct as it relates only to the general state regulation of the activity, without looking at either the anticompetitive consequences of the conduct or the comprehensive purpose of the state plan of regulation.

The danger of a pure "reasonableness" approach is that, when all is said and done, it depends heavily on

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[4] The attractiveness to a local government of controlling commercial markets is made self-evident by considering a cable TV franchise, the subject matter of *Boulder*. The City of New Orleans sold the right to wire its communities for cable television in 1981 in exchange for $450,000 per year *plus* a 5% franchise fee expected to result in $20 million for the city over ten years *plus* a $2 million capital investment for five studios and five mobile vans *plus* a $525,000 computer system for the city's library. *See Cable TV Franchising*, July 22, 1981. The economic potential of controlling the emergency and non-emergency ambulance market certainly is a factor in the decision of local government to expand into this market.

perspective. A local government will use a state statute permitting it to provide emergency ambulance service as a justification for expanding into a monopoly ambulance service for emergency and non-emergency activities, arguing that this is a more efficient economic arrangement. From the perspective of the private ambulance businesses which are destroyed, however, the local government's use of inexplicit state authority appears unreasonable. An indefinite expression by the state should not be sufficient to permit such a result because the state has the responsibility not only for providing local government but also of protecting and encouraging private business to serve all its inhabitants.

To illustrate practically, a city-owned ambulance monopoly which excludes competition within the city will beggar the ambulance services available to surrounding areas. This is because ambulance companies must have a certain volume of service to warrant maintenance of large numbers of high-quality, staffed ambulances. This volume is assured in high-density population areas like cities. These areas also promise strong competition. To balance this factor, the private ambulance companies will extend service into less-densely populated suburban and rural areas where there is less competition. If the city excludes all competition in the high-density metropolis to the advantage of its monopoly ambulance company, the surrounding areas may not provide an adequate service volume or geographically cohesive market to permit private companies to continue the high level of service possible when it also served the city's population. For example, a private company which previously competed in the city may also serve the eastern suburban and rural areas. Another ambulance company which competed in the city services the western suburban and rural areas. Excluded from the city market by the city monopoly, neither private company may have an adequate market in its respective suburb to maintain the same level and



quality of service previously possible. Also, the city's anticompetitive ordinances may bar the private companies from emergency transit priority and the use of sirens and flashing lights while traversing the city from one outlying area to the other. The exclusion of competition from the city thus undermines the quality and viability of ambulance service *in the areas surrounding the city.* Allowing the city to place its parochial interests in a less-than-comprehensive state regulatory setting endangers the interests of other areas of the state. *See Gold Cross Ambulance, supra.*

The Ninth Circuit standard focuses on the nature of the state alternative plan of regulation displacing competition. *Community Builders v. City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981). A local government may attempt to provide benefits to its residents at the expense of other residents of the state, but this should not be permitted to occur under state action immunity unless the state legislature contemplated the consequences.

For a city to claim state action immunity, it should demonstrate not only that the state intended to displace competition with regulation or monopoly public service, but also that the anticompetitive activities complained of were contemplated by and in furtherance of the regulatory ends sought by the state. The required showing under the first portion of this test is not subject to serious dispute. The *Parker* immunity doctrine was fashioned to deal with the situation where a state has decided to implement its anticompetitive policies through its subdivisions or private entities. This Court has already stated that a city must identify a state's decision to displace competition with regulation or monopoly service before it may claim state action immunity. *Lafayette, supra*, 435 U.S. at 413.

An additional showing for state action immunity must be required of a city, however, if this Court is to insure

that a city's anticompetitive acts are indeed state and not "city action." Without requiring a city to show that its anticompetitive activities were contemplated by the state and that the anticompetitive conduct was in furtherance of the state's policy, there can be no assurance that immunity will only be found where a city has implemented the state's anticompetitive policy and has not acted beyond its delegated, anticompetitive task.

The importance of requiring this additional showing is best illustrated by comparing the holding of the Seventh Circuit in this case with the Ninth Circuit's state action treatment in *Parks v. Watson*, *supra*. In *Parks*, the city of Klamath Falls argued that an Oregon statute authorizing city ownership of geothermal heating districts immunized its alleged anticompetitive activity in refusing to dedicate land to a developer so the city could acquire a geothermal well and thereby create a district. Had the Seventh Circuit considered the facts of *Parks* and applied its test for state action immunity, it no doubt would have held that the city's refusal to dedicate a strip of land to the plaintiff so the city could acquire a geothermal well and create a heating district was a reasonable and foreseeable consequence of engaging in the state-authorized activity of creating and operating geothermal heating districts. The Ninth Circuit found otherwise because it applied a test that assured that the conduct complained of was contemplated by the state. With language directly applicable to the case at bar, the Ninth Circuit explained:

> "[M]erely because the state may authorize a city to be the sole supplier of a natural resource [or sewage treatment service] and to set prices for that resource [or sewage treatment service], it does not necessarily follow that the city is immunized from antitrust liability where it attempts to tie the purchase of a non-monopolized product or service [such as sewage collection or sewage treatment service] to the sale of that natural resource [or sewage treatment service]."



*Parks v. Watson*, *supra*, 716 F.2d at 663.

Certainly the state can be required to give the clear expression required by the Ninth Circuit if not the more specific expression of state authorization which this Court refused to require in *Lafayette*, but which seems all the more appealing in the light of subsequent experience.

### C. Active State Supervision Should Be Required of All State Immunized Anticompetitive Activities to Insure That the Purposes of the State Regulatory Policy Supplanting Competition Are Realized.

#### 1. *Active state supervision is necessary to assure that the challenged activity is reasonably pursuant to the state regulatory plan displacing competition.*

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), this Court imposed the condition of active supervision "by the State itself" of the challenged anticompetitive restraint without distinction as to the entity involved. 445 U.S. at 105. Yet the Circuits have uniformly disregarded this requirement with regard to "traditional governmental activities."

In *Midcal* the challenged California program fails to receive state action immunity for the want of supervision as demonstrated by the fact that "[t]he State neither establishes prices *nor reviews the reasonableness* of the price schedules . . ." 445 U.S. at 105 (*emphasis added*). Active state supervision insures the reasonability of the challenged conduct in the context of the overall state regulatory program to displace competition.

The state is the only legitimate authority to consider whether the actual anticompetitive activity engaged in by a local government is consistent with the state's responsibilities to the general welfare of its residents. Only

the state has the breadth of concern adequate to insure that the challenged conduct is pursuant to state-wide, rather than city-wide, interests.

A local government cannot be empowered to supervise its own anticompetitive activity, even pursuant to clearly articulated affirmatively expressed authorization, because it is not impartial in its own program's administration. This is especially true if the Court accepts the Seventh and Eighth Circuits' standard of definition for the state authorization, i.e., that the challenged conduct be "foreseeable or reasonable" or "reasonable or necessary" consequences of such authorization. To let the local government supervise its own conduct is tantamount to letting the fox supervise the chicken coop.

***2. Active state supervision is necessary to assure that the challenged activity is in furtherance of the intent of the state regulatory plan.***

The challenged conduct must be both pursuant to and in furtherance of a clearly articulated affirmatively expressed state regulatory alternative to competition to immunize the conduct. Active state supervision insures that the anticompetitive activity is in furtherance of the state's goals. Without it, a local government could undertake permitted anticompetitive conduct pursuant to a state regulatory plan that actually contravenes the state's purpose of the plan.

For example, a state could legislate a regulatory plan for emergency medical services which encompasses multiple purposes. One articulated purpose is to encourage the expansion of paramedic programs. The state regulatory plan permits local governments to certify paramedic services. Another state purpose is to insure a basic amount of coverage to the residents of the state. This section of the regulatory plan permits a local government to enter into an exclusive contract with an ambulance service to provide primary response emergency care.



A local government melds the two distinct purposes into one exclusive contract with an ambulance company. The ambulance company becomes not only the exclusive emergency ambulance provider but also the sole source provider of paramedic services. As a provision of the exclusive contract, the county agrees to refuse to certify other private ambulance companies for paramedic service. Thus, the local government's exclusive arrangement contravenes the intent of the state to promote development of paramedic services, even though each step of the local government's conduct is arguably consistent with the state regulatory plan. *See Mercy Peninsula Ambulance Inc. v. County of San Mateo, et al.*, No. C84-1184 WWS (N.D.CA., *filed* March 13, 1984).

***3. Active state supervision is necessary lest its absence impose the supervision upon the federal judiciary.***

The true alternative to state supervision of anticompetitive local government activities is not local government supervision, but judicial supervision. This is because without state administrative supervision, no party with a complaint about the local government's anticompetitive conduct is going to be satisfied with an unfavorable local government supervisory decision; it will go to the courts.

***4. Active state supervision is necessary for all characterizations of anticompetitive local governmental activity because the distinction between traditional and proprietary governmental activities is too elusive to permit an exemption from supervision for the former.***

Several commentators have acknowledged the elusiveness of defining "traditional governmental activities." Areeda, *supra*, 95 *Harv.L.Rev.* at 443; Prosser, *Torts*, [4th ed. 1971] § 131, at 979. Yet the interest in using this distinction has persisted. *See Lafayette*, *supra*, 435 U.S. at 419, concurring opinion of Burger, Chief J. "It

has been said that the 'rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs.'" *Weeks v. City of Newark*, 62 N.J. Super. 166, 162 A.2d 314 (1960), *aff'd*, 34 N.J. 2250, 168 A.2d 11 (1961) *quoted in* Prosser, *supra* at 979.

The elusiveness of the distinction is illustrated, once again, by ambulance services. Ambulance companies are private, public, volunteer, or a mix of forms of ownership and operation. Providing ambulance services may change over time. The City of Santa Ana, California, for example, recently undertook the transfer of its paramedic services from its fire department to the private sector. Stout, J., "Cutting the Fog in Santa Ana," *Journal of Emergency Medical Services*, July, 1984. Ambulance services may be provided with or without fee, often depending on whether the service is emergency or non-emergency.

If use is to be made of the supposed distinction between "traditional" governmental activity and "proprietary" local governmental activity, the distinction should not be to differentiate the applicability of the supervisory requirement to the activity. Rather, the standard should require state supervision of all anticompetitive activity, but recognize the need for a lesser amount of supervision where "traditional governmental activities" are involved. That is, the distinction should go to the *degree* of active supervision that is to be required of the state. Moreover, the distinction should be made based upon how the local government finances the service provided. Fee-for-service kinds of activities should be held to be "proprietary." Services where specific payment of a fee for the service rendered is absent, such as fire and police services, could be defined properly as "traditional governmental activities."



## III. CONGRESS IS ENACTING LEGISLATION LIMITING LOCAL GOVERNMENT LIABILITY FOR DAMAGES UNDER THE SHERMAN ACT AND EFFECTIVELY RATIFYING THE COURT'S EXISTING STANDARDS OF AUTHORIZATION AND SUPERVISION.

The United States Senate during this 98th Congress, 2d Session, unanimously approved legislation eliminating local government liability for treble or compensatory damages under the Clayton Act, 15 U.S.C. §§ 15, 15a, and 15c, but leaving intact injunctive relief and award of costs and fees.[5] H.R. 5712, Making Appropriations for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies for Fiscal Year 1985, was amended to contain this measure. H.R. 5712, 98th Cong., 2d Sess. (1984). It will be before a Senate-House Conference committee at the time of filing of this brief.

The significance of this legislation is four-fold.

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[5] The text of the relevant provision of H.R. 5712 (98th Cong., 2d Sess.) is:

ADMINISTRATIVE PROVISION

SEC. 1. (a) Sections 4, 4A, and 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) shall not apply to any law or other action of or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licencing, and the establishment or provision of public services on an exclusive or non-exclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons, where such law or action is valid under State law.

(b) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) from any unit of local government or official thereof acting in his official capacity.

First, it implicitly ratifies the Court's requirements that a state must itself direct or authorize a local government anticompetitive practice (*Lafayette*) and that such anticompetitive conduct must be supervised (*Midcal*). Both standards were exhaustively reviewed by committees in both chambers of Congress during three days of hearings. *See* H.R. 2981, H.R. 3361, and H.R. 3688, 98th Cong., 2d Sess. (1984).

Second, the legislation expressly addresses an issue of concern to some Justices, i.e., that local governmental conduct violative of the federal antitrust laws could result in large treble damage awards. *See Cantor, supra*, 428 U.S. at 615, Stewart, J., dissenting; *Lafayetie, supra*, 435 U.S. at 442, Blackmun, J., dissenting.

Third, by removing the threat of damages in some instances, the Congress is removing an objection to a strict Court rule on the specificity of state authority needed to immunize anticompetitive conduct. The failure to enforce a strict rule against local governments will encourage them to expand anticompetitive conduct because they have less to fear even if a court determines that the actions were violative of the antitrust laws.

Fourth, the legislation acknowledges the "proprietary" versus "traditional" government activity distinction suggested by Chief Justice Burger, concurring opinion, *Lafayette*, 435 U.S. at 419. "Traditional" local governmental activity will be insulated from treble or compensatory damages for anticompetitive conduct even where no state action immunity was found to exist. These include "zoning, franchising, licensing, and the establishment of public services on an exclusive or nonexclusive basis in manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons." *See* S.1578, 98th Cong., 2d Sess. (1984), amending H.R. 5712, *supra*. The decision not to extend this insulation to local government activities in the "purchase or sale of goods or services on a commercial basis . . . in competition with private persons" is also a considered Congressional expression indicating its desire to protect free enterprise in markets where it already exists.



From time to time Congress has expressly considered and acted on the question of Sherman Act immunity for various state activities. Justice Blackmun noted the significance of these expressions in *Cantor v. Detroit Edison Co., supra*, 428 U.S. at 607 (concurring opinion, Blackmun, J.). He found that Congress intended the federal antitrust laws to pre-empt inconsistent state laws.

Justice Blackmun provides a succinct history of Court action and Congressional reaction on particular activities found to be anticompetitive by the Court but deemed worthy of exemption by the Congress. *Id.* These express grants of Sherman Act immunity are significant, since "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States v. Borden Co.*, 308 U.S. 188, 201 (1939).

## CONCLUSION

Wherefore, Amicus respectfully requests that the Court require specific state legislative authority and supervision of anticompetitive local government activities for state action immunity to apply to such activities, or, in the alternative, that the Court adopt the Ninth Circuit's standard, i.e., that the challenged conduct be shown to be pursuant to and in furtherance of a clearly articulated, affirmatively expressed, comprehensive state policy intended to displace competition.

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